

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VIRGINIA G. MOON PARROTT

Claimant

VS.

SEDGWICK COUNTY

Respondent

Self-Insured

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Docket No. 201,221

ORDER

On August 22, 1996, the application of respondent for review by the Workers Compensation Appeals Board of the Award of Administrative Law Judge John D. Clark dated March 22, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, James B. Zongker of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, E. L. Lee Kinch of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board with the caveat that while the Award indicates respondent stipulated to notice, it also shows notice pursuant to K.S.A. 44-520 as an issue to be decided by the Administrative Law Judge.

ISSUES

- (1) Whether claimant provided notice to respondent as required by K.S.A. 44-520 or whether claimant had just cause for her failure to provide said notice.
- (2) The nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

On September 2, 1994, while assisting a fireman in carrying a cot holding a patient up a narrow flight of stairs, the claimant fell backwards suffering injury to her low back. Claimant advised her coworker, Mr. Barry Guinn, of these injuries but did not further report the injuries to respondent for at least two weeks. Claimant testified that she didn't report her accident because she felt she was going to get better, but instead the problem worsened. Claimant left work after September 12, 1994, and was referred to Emergency Medical Services by respondent for medical treatment. Claimant was eventually referred to Anthony G. A. Pollock, M.D., a board-certified orthopedic surgeon who diagnosed a large central herniated disc at L5-S1 and performed an L5-S1 discectomy. Claimant was also seen by several other doctors including Jane K. Drazek, M.D., and Ernest R. Schlachter, M.D. She was placed on home exercises and eventually released to return to work. Because of the restrictions placed upon claimant the respondent was unable to accommodate her in any employment position. Claimant did obtain employment with St. Francis Emergency Room part-time for the period April 15, 1995 through September 30, 1995. Subsequent to September 30, 1995, additional restrictions were placed upon claimant by Dr. Pollock and claimant was unable to return to work at the St. Francis Emergency Room. At the time of the regular hearing claimant was unemployed.

Respondent first contends claimant failed to provide notice under K.S.A. 44-520 which states:

"Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary."

Claimant acknowledged the only person with whom she discussed the accident was Barry Guinn. Barry Guinn was described at various times as claimant's partner and, which on cross-examination by respondent's attorney, claimant testified Mr. Guinn was also one of her supervisors, along with Lyle Webster. While claimant does acknowledge she failed to talk to Mr. Webster within the ten days required by K.S.A. 44-520, a conversation with Mr. Guinn on the date of accident would constitute notice to her supervisor of an accidental injury with sufficient particularity to satisfy the requirements of K.S.A. 44-520. Claimant's testimony that Mr. Guinn was her supervisor is uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). As such, the Appeals Board finds claimant has satisfied the requirements of K.S.A. 44-520 and appropriate notice was provided to respondent regarding the accident of September 2, 1994.

The Appeals Board must next consider the nature and extent of claimant's injury and/or disability.

K.S.A. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

Tasks loss analyses were performed by Mr. Jerry Hardin and Ms. Karen Terrill. These tasks loss analyses were then presented to the treating orthopedic surgeon, Dr. Pollock, to Dr. Drazek who evaluated claimant at the request of respondent, and to Dr. Schlachter who evaluated claimant at the request of claimant's attorney. Based upon Mr. Hardin's tasks analysis, Dr. Pollock evaluated claimant's tasks loss at 50 percent. Based on Karen Terrill's tasks analysis, Dr. Pollock evaluated the tasks loss at 23 percent. Based upon Mr. Hardin's tasks analysis, Dr. Drazek evaluated claimant's tasks loss at 33 percent and at 18 percent based upon Karen Terrill's tasks analysis. Dr. Schlachter, in considering only Mr. Hardin's tasks analysis, found claimant's tasks loss to be 44 percent. The Appeals Board finds no compelling reason for placing greater emphasis upon the opinion of one doctor over that of another. As such, in evaluating and considering the total tasks loss opinions in the record, the Appeals Board finds claimant has suffered a 34 percent loss of ability to perform work tasks that the claimant performed in substantial and gainful employment during the 15-year period preceding the accident.

The Appeals Board must next consider the difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage that the

claimant was earning after the injury. In 1993 the Kansas Legislature made a significant modification in K.S.A. 44-510e(a). Prior to July 1, 1993, work disability was computed per the following legislative language:

“The extent of permanent partial general disability shall be extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment.”

The Kansas Legislature in eliminating the “ability” language contained in K.S.A. 44-510e and inserting in its place language dealing with the wage the worker “is earning” after the injury has shown a definite intent to consider actual wages being earned by claimant in most workers compensation situations. While the Appeals Board acknowledges that in certain instances a wage may be imputed to a claimant, even though claimant would not be earning that wage, such as in a circumstance similar to that found in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) the Appeals Board does not find circumstances akin to Foulk in this case.

Claimant attempted to return to work with respondent with the restrictions placed upon her by her treating physician and respondent was unable to meet those restrictions with an accommodated job. When claimant was successful in obtaining employment it was a part-time position with the St. Francis Emergency Room at a less than comparable wage. A review of claimant’s earnings while with St. Francis Emergency Room shows claimant earned a total of \$5,216.96 during the 24.14 weeks claimant was employed between April 15, 1995 and September 30, 1995. This computes to an average income of \$216.11 per week, which constitutes a 72 percent loss of actual wage earnings. In averaging the loss of ability to perform work tasks of 34 percent with the loss of wage earning capacity of 72 percent the Appeals Board finds claimant has suffered a work disability of 53 percent during the period of time she was employed with St. Francis Emergency Room.

At all other times subsequent to her departure from respondent on September 12, 1994, with the exception of the 21 weeks she was on temporary total disability compensation claimant has had no income. This represents a wage earning loss of 100 percent. When considering claimant’s 34 percent tasks loss and the 100 percent wage loss during the periods of time when claimant was not on temporary total disability compensation and not employed, she suffered a work disability of 67 percent.

The Award of the Administrative Law Judge dealt with additional issues not appealed to the Workers Compensation Appeals Board. Insofar as the opinions of the

Administrative Law Judge contained in that Award do not contradict the opinions contained herein, the Award of Administrative Law Judge should be, and is hereby, affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated March 22, 1996, should be, and is hereby, modified and claimant is granted an award against respondent as above specified.

Claimant is entitled to 21 weeks temporary total disability compensation at the rate of \$319 per week totaling \$6,699 followed thereafter by a total of 274.03 weeks permanent partial disability compensation at the rate of \$319 per week in the amount of \$87,415.57 which is a combination of claimant's 53% work disability and 67% work disability during the appropriate times as above specified. This constitutes a total award of \$94,114.57.

As of June 3, 1997, claimant would be entitled to 21 weeks temporary total disability compensation at the rate of \$319 per week totaling \$6,699 followed thereafter by 122.57 weeks permanent partial disability compensation at the rate of \$319 per week totaling \$39,099.83 for a total due and owing of \$45,798.83. Thereafter claimant would be entitled to 151.46 weeks permanent partial disability compensation at the rate of \$319 per week totaling \$48,315.74 until fully paid or until further order of the Director.

In all other regards the Award of the Administrative Law Judge is affirmed insofar as it is not in contravention to the opinions expressed herein.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against respondent to be paid as follows:

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| Ireland Court Reporting, Inc. | |
| Transcript of regular hearing | \$234.70 |
| Bannon & Associates | |
| Deposition of Ernest R. Schlachter, M.D. | \$155.60 |
| Deposition of Jerry Hardin | \$263.30 |
| Barber & Associates | |
| Deposition of Karen Crist Terrill | \$128.00 |
| Deposition of Jane K. Drazek, M.D. | \$148.00 |
| Deposition of Anthony G. A. Pollock, M.D. | \$157.20 |

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
E. L. Lee Kinch, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director